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No. 2748

United States

Circuit Court of Appeals

For the Ninth Circuit.

COUNTY OF HAWAII,

Plaintiff in Error,

vs.

HALAWA PLANTATION, LIMITED, a Corporation,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

WADE WARREN THAYER,
Attorney for Plaintiff in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2748.

COUNTY OF HAWAII,

Plaintiff in Error,

vs.

HALAWA PLANTATION, LIMITED, a Corporation,

Defendant in Error.

Brief on Behalf of Plaintiff in Error.

STATEMENT OF THE CASE.

The above-entitled action comes to this court on a Writ of Error to the Supreme Court of the Territory of Hawaii. The action came to the Supreme Court of the Territory on a Writ of Error to the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii. The plaintiff in error above named was the defendant and plaintiff in error in the Supreme Court of the Territory of Hawaii and was defendant in the original proceeding in the lower court.

Defendant in error, the Halawa Plantation, Limited, a corporation existing under and by virtue of the laws of the Territory of Hawaii and operating a sugar plantation in the District of North Kohala, County of Hawaii, commenced the action by a complaint filed on date of July 22, 1915, wherein, as a basis of action, it alleged the burning of a field of sugar-cane, the property of the plaintiff corporation, by fire originating from a fire started on the

roadside on the morning of October 18, 1912, by road laborers employed by the County of Hawaii for the purposes of burning rubbish. The basis of the claim for damages was the alleged negligence of said employees in starting the fire and the alleged negligence in controlling it thereafter.

On date of August 13, 1912, the defendant the County of Hawaii, by Wm. H. Beers, County Attorney, demurred to the complaint, among other grounds of demurrer, alleging:

I.

That the same does not state facts sufficient to constitute a cause of action against the said defendant.

II.

That the said defendant, being a body corporate and politic, is not liable under the law for the alleged negligent and wrongful acts set forth in the said complaint.

III.

That the function of repairing, maintaining and constructing public streets, roads or highways being a Governmental function, the said defendant is not liable under the law for any negligent or wrongful acts committed by its servants or employees in respect to the performance of the said function.

IV.

That there is no authority by which the said defendant may be held for the alleged negligent and wrongful acts set forth in the said complaint. (Transcript of Record, page 22.)

On date of January 22, 1914, the Trial Court over-

ruled the demurrer and on date of May 11, 1914, the defendant, the County of Hawaii, answered by denying each and every allegation of the complaint and made a demand for a trial by jury. (Transcript of Record, page 26.)

The action came to trial, before a Jury, in the said Circuit Court on date of November 18, 1914. On date of November 25, 1914, the jury returned a verdict for plaintiff, the Halawa Plantation, Limited, in the sum of Eleven Thousand Seven Hundred Twenty-seven Dollars and Seventy-nine Cents ($11,727.79) (Transcript of Record, page 298), and on date of December 3, 1914 judgment for the sum aforesaid was rendered and entered in favor of said plaintiff and against said defendant (Transcript of Record, page 300).

On date of April 17, 1915, a Writ of Error issued from the Supreme Court of the Territory of Hawaii directed to the said Circuit Court of the Third Judicial Circuit, by virtue of which the record of all proceedings in said Circuit Court was sent to the Supreme Court of the Territory of Hawaii for review. The Assignments of Error in the said Writ of Error were eleven in number. (Transcript of Record, page 3.) The Assignments of Error numbered 1, 2, 3 and 11 were directed respectively to the action of the lower court in overruling the demurrer to the complaint, denying the motion for nonsuit, denying the motion for directed verdict and denying the motion for new trial. The basis of all of said four Assignments of Error was the claimed immunity of the defendant, the County of Hawaii, from liability

for the injuries alleged to have been caused by the negligence of its employees.

The Assignments of Error numbered 4, 5 and 6 related to the giving of instructions requested by the plaintiff corporation. These Assignments were formal in their character and merely served to preserve intact the claimed immunity of the defendant as aforesaid.

The Assignments of Error numbered 7, 8, 9 and 10 related respectively to the refusal of the court to give defendant's requested instructions numbered 5, 6 and 7, bearing upon the question of contributory negligence, and the refusal to give any instructions on the said question of contributory negligence. These requested instructions will be quoted at length in the argument upon this question.

The trial of the case was quite protracted and much of the evidence of a complicated and technical character but no error was claimed as to the wrongful admission or rejection of evidence or as to the actual loss, as fixed by the jury, resulting from the burning of the cane.

So that before the Supreme Court of the Territory of Hawaii, but two vital questions were presented, first, as to whether the County of Hawaii was liable for the damages sustained by the plaintiff corporation, and, second, as to whether the question of contributory negligence of the plaintiff was a question of law for the court or a question of fact to be submitted to the jury.

The decision of the Supreme Court in full is on pages 301 to 308, inclusive, of the Transcript of

Record. The specific errors of which complaint is made will be pointed out in argument hereinafter.

The Assignments of Error in the Writ of Error from this court directed to the Supreme Court of the Territory of Hawaii are five in number. The first two of said Assignments relate to the question as to whether the County of Hawaii is liable for the injuries sustained by reason of the negligence of its employees. The last three Assignments relate to the question as to whether the conditions surrounding the field of cane, and their bearing on the question of contributory negligence on the part of plaintiff corporation, were questions of fact for the jury or questions of law for the Court.

That this Court may better comprehend the arguments hereinafter set forth, a brief description of the location where the fire occurred, as disclosed by the evidence, might well be in order at this point.

The district of North Kohala is located along the north coast of the County of Hawaii and extends from the seacoast to the crest of the ridge of the Kohala mountains at an approximate elevation of four thousand feet and distant four miles or more from the sea. The coast line runs nearly due east and west and is nearly parallel to the crest of the ridge of the mountains. The cane belt of the district is along the seacoast and extends inland, a distance nearly two miles and at an elevation of about fifteen hundred feet. Within this cane belt are five sugar plantations, and they are located as follows, beginning at the east end: Nioulii, Halawa, Kohala, Union Mill and Hawi. Each of the five plantations has a frontage on the sea and extends

inland with a width nearly uniform with the sea frontage. Across each of said five plantations. nearly parallel with the seacoast and nearly a mile distant therefrom, at an elevation between six or seven hundred feet, runs the main Government road, the highway for all traffic to and fro from one end of the district to the other.

Within and a part of the lands included in the plantation of the plaintiff corporation was a leasehold of a land known as Aamakao. Within and a part of said land of Aamakao and included in and part of the said leasehold was a gulch known as Aamakao Gulch extending inland at right angles from the sea.

The gulch of Aamakao was described by Atkins Wight, a witness for the plaintiff corporation and its manager at the time of the fire, as wide and deep—too wide to be bridged across the top from side to side at the level of the cane-field. The evidence showed that the slopes or sides of the gulch were from two hundred and fifty to three hundred feet from the top to the bottom and the bottom of the gulch approximately two hundred feet across. The evidence also showed that the slopes or sides of the gulch were too steep for cultivation and were abandoned to a growth of wild vegetation, which on the slope on the west side, being exposed to the morning sun, was of exceedingly rank growth. Where the road reached the top of the slope on the west side of the Aamakao Gulch it turned inland descending on a grade along the side of the slope to the bottom, thence straight across the bottom ascending the opposite side

on a similar grade, reaching the level of the cane-fields on the east side at a point nearly opposite where it began to descend on the west side. A road thus constructed along the slopes of the gulch would necessarily have a high bank on the upper side and a steep descent on the lower side. Plaintiff's Exhibit I (Transcript, page 338), a photograph, shows the road near the bottom of the slope on the west side where it turns to cross the gulch. On date of October 18, 1912, the date of the fire in question, a contractor, under a contract from the County of Hawaii, had about completed a concrete bridge across the watercourse at the bottom of the gulch. The photograph does not show the bridge but does show the tool-house used by the contractor. The testimony of Southworth, who was at that time the County Engineer of the County of Hawaii, a witness for plaintiff, locates the bridge at a short distance east of the tool-house. The approaches to the bridge were to be made of fills of rocks and earth and were not a part of the bridge contract but were to be made by the road laborers of the district of North Kohala in the employ of the County. For the purpose of excavating materials for the fills or approaches to the bridge, the road laborers arrived at the vicinity of the bridge about seven A. M. on the said date of October 18, 1912. They were divided into two gangs, one gang going to the east side of the bridge and the other, consisting of seven men including a luna (Hawaiian for foreman), to the west side. The gang on the west side of the bridge started the fire which later caught in the accumulation of dry vege-

tation lying on the west slope of the gulch and by said vegetation was carried to the cane-field.

The spot where the original fire was started by the road laborers is shown in said photograph (Plaintiff's Exhibit I), where the man is standing on the roadside near the foot of the west slope of the gulch. Behind the man can be faintly distinguished a high bank on the upper side of the road, which said bank is more than twice the height of the man. The evidence showed the height to be about eleven feet. The testimony of Southworth (Transcript of Record, pages 87 to 90), witness for plaintiff, showed that this bank, before the time of the fire, was overgrown with a rank growth of grass and other vegetation. The same witness also testified that the entire slope of the gulch at the same time was thickly covered with an accumulation of dry rubbish, consisting of grass, weeds and leaves from lauhala trees. He described the same as being exceedingly dry. The photograph (Plaintiff's Exhibit I) shows the lauhala trees. The cane-field, as appears from the said photograph, was not visible from the place on the roadside where the fire began but the luna of the road gang on the west side of the gulch, called as a witness by the plaintiff, testified that he knew that over the crest of the slope of the gulch there was a cane-field. Atkins Wight, manager of the plantation at the time of the fire, and witness for plaintiff corporation, testified that the accumulation of dry material on the slope of the gulch extended from the place where the fire was started up to and into the cane-field which was separated from the slope of the

gulch by a wire fence only. (Transcript of Record, pages 257 to 259.) The testimony of all of the witnesses was that for about three months prior to the time of the fire there had been no rain in the district of North Kohala and that all vegetation had become dried up.

By the luna's direction the bank and a part of the roadside were cleared of the dry grass and other vegetable matter and the dry material thus cleared was gathered into a pile in the gutter on the upper side of the road and next to the bank. One laborer was on the road with the luna, another was on the upper edge of the bank directly above the fire and the others were near. Shortly after seven o'clock A. M. the luna directed the laborer who was with him on the road to set fire to the pile of rubbish on the roadside. The wind, which was the regular trade wind of that district, up to this time had been blowing moderately, but soon after the fire was lighted, according to the testimony of the luna and the other laborers, the wind suddenly increased. There can be no doubt from the evidence adduced that, to the minds of the men there present, there was an apparent increased velocity of wind which they were not able to describe intelligently. One witness stated that it was a strange wind and compared it to a whirlwind. There can be no doubt that the laborers there present found the fire they had started caught by a wind that was unexpected. The fire soon caught on the slope above the bank and, despite anything the laborers could do, it quickly swept up in the face of the wind along the

slope which was thickly covered with dry vegetable matter and into the cane-field.

ERRORS RELIED UPON.

The foregoing statement of the case discloses two and only two questions to be considered by this Court, namely:

First. Is the County of Hawaii liable for the consequences of the alleged negligent acts of its employees as set out in the complaint in this action and as raised by the first and second Assignments of Error herein? (Transcript of Record, pages 313 and 314.)

Second. Was the question whether there was contributory negligence on the part of the plaintiff corporation a question of law for the court or a question of fact to be submitted to the jury as raised by the third, fourth and fifth Assignments of Error herein? (Transcript of Record, pages 314 to 317.)

ARGUMENT.

The questions will be discussed in the order stated.

The first question was disposed of by the Supreme Court of the Territory of Hawaii in words as follows, to wit:

> "The demurrer was properly overruled. * * * The facts alleged show negligence on the part of the servants of the defendant and that such negligence was the proximate cause of the injury alleged. The liability of the defendant county for such negligence is settled in this jurisdiction by the decisions in Matsumura v. County of Hawaii, 19 Haw. 18

and 496. We are inclined to believe that we would hold otherwise if this was a case of first impression, but the rule that a county is liable for the injury to private propery caused by the negligent acts of its road employees, acting within the scope of their employment, having been announced in the first decision in the Matsumura case (19 Haw. 18), and reaffirmed in the same case in the later decision (19 Haw. 496) and the legislature having met in four regular sessions since the announcement of such rule without enacting any statute adopting a different rule, we must consider that the legislature has acquiesced in the rule announced.

* * *

The defendant's motion for a directed verdict was based principally upon the ground that the defendant as a body corporate and politic is not liable for the negligent acts of its employees, acting with the scope of their employment, and was properly denied for the reasons heretofore given for overruling the demurrer."

(Transcript of Record, pages 303 to 305.)

The said Supreme Court of the Territory of Hawaii held the precedent of the Matsumura case as controlling in the case at bar. The question has not before been taken to a higher court and therefore is now an open question before this court. But aside from the fact that the ruling in the Matsumura case is still open to the consideration of this court, there are facts in the said case which, we

contend, distinguish it from the pending one. The facts of the Matsumura case are substantially as follows: Some employees of the County of Hawaii, engaged in authorized road repairs, to facilitate their work, tapped an available flume of water and brought and used the water on the road for sluicing purposes. The action of the water loosened a large embankment of earth, thereby precipitating it down a slope upon Matsumura's premises and demolishing his dwelling-house and store. Matsumura brought action against the County of Hawaii. The defendant demurred and the lower court sustained the demurrer. The first decision (19 Haw. 18) was on the appeal from that ruling. The Appellate Court was divided, two joining in overruling the lower court and one, Justice Wilder, dissenting. The prevailing opinion was written by Justice Ballou, and there are few opinions in which there appears a more careful analysis of the mass of confusing authorities. The later decision in the same case (19 Haw. 496) dealt on only questions of error committed at the trial. It is principally the former of said decisions we have now to consider. But the decisive point in the Matsumura case, which distinguishes it from the case at bar, must be carefully observed. In the case we are now considering, we contend that the point upon which the decision must turn is whether the repair of highways in a county in the Territory of Hawaii is to be classed as a governmental function or as a private or corporate function. But in the Matsumura case the point upon which the decision hinged was

the invasion of a constitutional property right. On page 22 of the decision in said case Justice Ballou said:

> "The only possible exemption applicable seems to be that taken in those cases which draw a distinction betweeen the governmental and corporate function of a municipality."

And then a little later on same page said:

> "We need not enter into a discussion of these authorities, however, nor even into those holding that the repair of highways is properly classed as a corporate and not a governmental function, because we are of the opinion that under no proper conception of the doctrine of municipal immunity in the performance of governmental functions can it be held to include immunity for negligence resulting in the direct invasion of plaintiff's private right as an adjacent land owner."

And again at the bottom of page 23 said:

> "The case at bar is concerned only with the invasion of a private right through misfeasance of the defendant's agent, either as a necessary result of his wrongful act or because of the negligent manner in which it was done. Upon either theory a municipal corporation would be liable."

The distinction between the Matsumura case and the case at bar is well illustrated by two cases both in the same jurisdiction, namely, *Ashley v. Port Huron,* 35 Mich. 296, and *Alberts v. City of Muskegon,* 146 Mich. 210.

In the former case, *Ashley* v. *Port Huron,* the action was to recover damages for injury to plaintiff's house caused by negligence in the construction of a sewer which threw large quantities of water upon the premises which otherwise would not have flowed there,—closely paralleling the Matsumura case.

In the latter case, *Alberts v. City of Muskegon,* the action was to recover damages for the destruction of plaintiff's barn by fire, caused by negligence of municipal employees in the operation of a steam roller, used in repairing the streets adjacent to plaintiff's property. The evidence showed that the defendant City was repairing the street with crushed stone and in the operation was using a roller moved and operated by steam; that the fuel used was coal; that the stack of the engine was not equipped with a spark-arrester; that the wind was blowing from the roller towards the barn; that fire escaped from the stack, igniting dry rubbish which carried the fire to the barn and destroyed the barn and its contents. The case closely parallels the case we are now considering.

In the former case, *Ashley v. Port Huron* (and it is to be observed that the decision was written by Chief Justice Cooley, author of Constitutional Limitations), after discussing numerous authorities, the Court held as follows:

> "It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act

which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the City exceeds its lawful jurisdiction."

In the later case of *Alberts v. City of Muskegon,* the Court, among other things, said:

"The case at bar is not of damages resulting from a direct trespass or from misfeasance of the City amounting to a trespass. It is a case of consequential inquiry resulting directly from the negligent conduct of the defendant's agents. In this fact lies the distinction which, in view of former decisions of this court, must be made, and, when made, is controlling."

The Court then referred to said "former decisions," among which was the said case of *Ashley v. Port Huron* and quoted with approval that part of said decision hereinbefore quoted. The Court then continuing, said:

"In the case at bar, it cannot be said that the burning of plaintiff's property was the necessary result of employing the roller as equipped upon the road. The machine and the agents of the City were employed in performing public work. This employment involved no injury to plaintiff's property. Between the performance of the work and the injury complained of were the alleged facts of improper equipment of the roller; direction and velocity of the prevailing wind; management of the machine. In some respects, the case may be regarded as closely resembling many in which municipal liability has been judicially affirmed. In essentials it belongs to the class of cases where the injury is the result of negligence of municipal agents employed in public work for which the municipality is not at common law liable.

"The judgment is reversed, with costs of both courts to defendant. No new trial will be granted."

In Arkansas, California, Connecticut, Oklahoma, Massachusetts, Michigan, New Jersey, South Carolina, Vermont, Tennessee and Texas the duty of repairing and maintaining public highways is regarded as a governmental one, and in the absence of statute a municipality is not liable for negligence in respect thereto.

Arkadelphia v. Windham, 49 Ark. 139;
Winbiglar v. Los Angeles, 45 Cal. 39;
Hewison v. New Haven, 37 Conn. 475.
Blaylock v. Muskogee, 117 Fed. 125;
Barney v. Lowell, 98 Mass. 570;
Detroit v. Blackeby, 21 Mich. 84.
Pray v. Jersey City, 32 N. J. L. 394;
Young v. Charleston, 20 S. C. 116;
Bates v. Rutland, 62 Vt. 178;
Galveston v. Posnainsky, 62 Tex. 118;
Connelly v. Nashville, 110 Tenn. 262;
Wagner v. Portland, 40 Ore. 389.

In the case of *Wagner v. Portland,* 40 Ore. 389, the application of the rule is described as follows:

> "Municipal corporations exist in a dual capacity, and their functions are two-fold. In one they exercise the right springing from sovereignty, and, while in the performance of the duties pertaining thereto, their acts are political and governmental. Their officers and agents, though elected or appointed and paid by them, are nevertheless public functionaries, performing a public service in which the corporations, as such, have no particular interest, and from which they derive no special benefit or advantage in their private or corporate capacity. Such officials are not, strictly speaking, the servants and agents of the municipalities through which they derive their authority but are officers, agents and servants of the state, and for their acts of omission or commission the municipalities themselves are not liable."

In the discussion of this phase of the question thus far no distinction has been made in the character of the defendant, as to whether a county or chartered municipality. But the common-law rule of immunity does make a distinction. Even in those jurisdictions which hold chartered municipalities not exempt from liability, counties are held exempt. It is not necessary to inquire whether the grounds upon which the distinction is made seem based on sound reasons. The authority for it is the decisions of the courts. It is a part of the common law and cannot be abolished except by the law-making power. The distinction is clearly pointed out by Addison on Torts as follows:

> "A plainly marked distinction is made and should be observed between municipal corporations, as in incorporated villages, towns and cities, and those other organizations, such as townships, counties, school districts and the like, which are established without any express charter or act of incorporation, and clothed with but limited powers. These latter political subdivisions are called *quasi* corporations and the general rule of law is now well settled that no action can be maintained against corporations of this class by a private person, for their neglect of public duty unless such right of action is expressly given by a statute."

And again, in the case of *Markey v. Queens Co.*, 154 N. Y. 675, it is said:

> "There is a distinction between counties as civil divisions of the State for purposes of local government, and chartered municipal corporations in respect to their liability for corporate acts. This distinction was not abrogated by the county law, and it was not intended that counties should be treated as upon a par with cities, when engaged in similar transactions."

In the case at bar, the Supreme Court of the Territory has held the defendant county not exempt from liability on the authority of the Matsumura case. But the decision in that case, as we have hereinbefore shown, makes plain the distinction between the two cases. The tort in that case was the invasion of a constitutional right. In the pending case, the basis of a tort is negligence of laborers while in the employ of the County.

If the authority of the Matsumura case does not control, is there any other precedent in the adjudicated cases in the Territory of Hawaii that does control? We contend that the case of *Coffield v. Territory,* 13 Haw. 478, controls. That action was one against the Territory before counties were formed and the maintenance of public highways transferred to them. It was based on a theory that the Territory was a municipal corporation. The case was taken to the Supreme Court on exceptions to an order sustaining a demurrer and dismissing the complaint and in its decision the Court said:

> "In a certain sense all governments are municipal corporations. In this sense each of

the several States and the United States is such a corporation. Yet these, being sovereignties, are not liable to suit in their own courts except by their own consent. The same is true of certain political subdivisions, such as counties, townships, school districts, road boards, etc. These also are in a sense municipal corporations, and yet they share in the immunity of the State from liability to suit unless made liable by statute. They are often described as *quasi* corporations and are regarded principally as agencies, auxiliaries or instrumentalities of the general government. There is, however, a political subdivision of another class that is usually created by charter or incorporated under statutes, generally for a community more or less compact, supposedly at the request or with the consent, express or implied, of the members thereof, and mainly for the special interests and convenience of the particular locality and its people. Such corporations are supposed to have a private character to a certain extent, and are therefore held to be liable like other private corporations. They are often spoken of as municipal corporations proper as distinguished from the other class above referred to as *quasi* corporations. See I Dill. Mun. Corp., secs. 20, 23, 26. Bearing in mind this distinction between municipal corporations proper and *quasi* corporations, the general rule is, as stated in 2 Id. 997, 998, that 'In the United States, there is no common-law obligation resting upon *quasi*

> corporations, such as counties, townships, and New England towns, to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers power to levy taxes therefor, the general tenor of the decisions is to treat this as a public, and not a corporate, duty, and to regard such corporations, in this respect, as public or State agencies, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute'; but, 'The general doctrine of American courts * * * in respect of municipal corporations proper, has been to hold them civilly liable for injuries from defective streets.' This distinction may not be based altogether on sound reasoning but it is well established. * * * "

The function of repairing and maintaining public highways by the Territory of Hawaii was undoubtedly a governmental or public one. That the legislature has transferred to the counties the power to do the same thing does not change the nature of the function itself, and is the same now as before, namely, governmental.

The plaintiff in error in the case at bar, we contend, cannot be held responsible for the negligent act alleged in plaintiff's declaration. There is no

statute in the Territory of Hawaii which imposes upon a county any liability for tort.

"Counties are not subject to liability for any tort in the absence of statutes which either expressly or by implication impose such liability on them."

11 Cyc. 497.

"The authorities are very decidedly against the doctrine that counties may be held liable for a negligent breach of duty respecting highway where there is no statute creating liability. The current of opinion is indeed against the liability of the county for injuries from negligence resulting from any cause, although directly connected with the county affairs, yet, under like circumstances, a municipal corporation would be held liable in most jurisdictions."

Elliott on Roads & Streets, 2d ed., 458.

Swineford v. Franklin Co., 73 Mo. 279.

"In accordance with the prevailing doctrine it was held that a county is not liable for the negligence of a person engaged in work upon one of the highways owned by the county."

Elliott on Roads & Streets, 2d ed., 458.

Fry v. Albermarle, 86 Va. 195.

"Public *quasi* corporations have been defined as: It is universally agreed that all those subdivisions of State territory, such as counties, townships, school districts and like bodies, which are created by the legislature for public purposes and without regard to the wishes of their inhabi-

tants, are to be included in the class known as '*quasi* corporations.' They are in essence local branches of the state government, though clothed with the corporate form in order that they may better perform the duties imposed upon them."

Abbott Municipal Corp. 12.

"The rule that counties are not liable for torts, in the absence of statute, is universally acknowledged, and the great weight of authority is in favor of the conclusion that, even when a duty is imposed by statute, the county is not liable for failure to perform it, in the absence of express provision creating such liability."

El Paso Co. v. Bish, 18 Colo. 474.

Marion Co. v. Riggs, 24 Kan. 255.

"The overwhelming weight of authority is to the effect that the duty of counties to construct and keep in repair highways and bridges whether imposed by the common law or by statute does not carry with it an implied liability to answer in damages for injuries sustained from defective or unsafe highways or bridges, and that such liability can only arise from express statutory enactment or by implication necessarily arising therefrom."

7 Am. & Eng. Ency. of Law, 950.

There is such an overwhelming mass of authorities in support of the immunity of counties from liability for tort that we deem it unnecessary to cite them at length.

QUESTION OF CONTRIBUTORY NEGLIGENCE.

The Territory of Hawaii is divided into five judicial circuits. The Third Judicial Circuit includes the District of Kohala, Kona and Kau, of the Island of Hawaii. (Revised Laws, sec. 2261.) In the Territory of Hawaii, jurors are drawn from lists selected by the Jury Commissioners appointed by the Judges of the respective circuits. The lists are made "from the citizens, voters and residents of the several precincts in the circuit, as near as may be according to and in proportion with the respective number of registered voters last registered in each of such precincts." (Id., sec. 2412.) The County of Hawaii is coextensive with the Island of Hawaii. (Id., sec. 1497.)

In extent, the Island of Hawaii is approximately ninety miles from north to south and sixty miles from east to west. The aforesaid districts of Kohala, Kona and Kau are on the west side of the Island and County of Hawaii. (See any geographical map of the island.)

Judicial notice or knowledge may be defined as the cognizance of certain facts which Judges and jurors may, under the rules of legal procedure or otherwise, properly take and act upon without proof because they already know them. (16 Cyc. 849.)

Thus it will be seen that there might be many facts which do not appear in the record of this case, but of which any jury drawn might have such familiarity as to take judicial notice thereof. Any juror drawn in the Third Judicial Circuit would know that

the sugar industry is almost the exclusive industry in the Districts of Kohala and Kau, and perhaps the major industry in the District of Kona; that the laborers employed on the sugar plantations number many thousands, composed largely of foreign nationalities; that the sugar industry is confined entirely to territory bordering on the seacoast; that the interior of the island is mountainous, suitable only for cattle ranges and with sparse population; that there is only one governmental highway around the island, and usually located near the middle of the cane belt; that along said highway almost the entire population on the sugar plantations reside, so that the highway more resembles a city street than a country road.

Any juror so drawn would also be familiar with the habit of the sugar-cane plant; that it is of perennial growth and usually requires about eighteen months from planting to maturity; that it produces a long stalk of many joints, at every joint of which grows a long blade or leaf, which, during the progress of growth of the stalk, usually matures quickly and drops to the ground, producing a large accumulation of dry blades or leaves on the ground among the stalks of cane; that during a period of long continued dry weather, such blades from the cane stalks become very dry and are very inflammable.

Also there would be no juror not familiar with the lauhala tree, as its name indicates, a tree indigenous to Hawaii, not of tall growth but yielding long blade-like leaves in great profusion, which mature and drop somewhat like the leaves of the sugar-cane

producing on the ground under the trees a large accumulation of dry leaves, highly inflammable and which produce intense heat when burning; and also would know the regularity and direction of the trade winds which prevail during the summer months, and would also know all operations connected with the cultivation of sugar-cane. Perhaps there would be no juror drawn who would not know that fire in a cane-field does not burn the stalks of cane, but only the dry accumulation of cane blades or leaves on the ground; but he would also know that after thus burned the juices in the cane stalks soon deteriorate, and that after three or four days, the deterioration is rapid so that cane so burned must be quickly harvested and milled.

The map or plat of the field, on which the cane was burned (Transcript of Record, Plaintiff's Exhibit 10, page 343) shows where the road bends to descend the slope of the gulch. Plaintiff's Exhibit 1, a photograph (Transcript of Record, page 338), shows the place where the road again bends to cross the bottom of the gulch; shows where the fire started at where the man is standing in the photograph (Transcript of Record, page 87, 88); shows by the ink marks made on the photograph the widening path up which the fire traveled (Transcript of Record, page 90). The term "pali" which appears in the testimony is the Hawaiian word for bank, or slope, and may mean the bank formed on the upper side by grading the road, and may mean the slope or side of the gulch. Other words "mauka" and "makai," appearing in the testimony, are Hawaiian words in

common use, "Mauka" meaning inland, and "makai" meaning toward the sea.

The map or plat (Plaintiff's Exhibit 10, *supra*) shows that the prevailing northeast direction of the trade winds would blow squarely across the road up the slope of the gulch to the cane field.

The following instructions were requested by the defendant county and refused by the trial court:

"Instruction No. 5.

"The Court instructs you, Gentlemen of the Jury, that even if you find from the evidence that the road laborers employed by the defendant negligently started the original fire on the roadside at Aamakao, on the morning of October the 18th, 1912, as alleged in the plaintiff's complaint, or even that said laborers thereafter negligently managed said fire after it was started, still, if you also find that the space between where the fire was started and the cane field was a grove of lauhala trees, and that upon the ground under the said trees was an accumulation of dry lauhala leaves and other dry leaves, dry grass and other dry vegetation, and if you find that such dry materials were inflammable and that the same made an unbroken train of dry inflammable materials and that the same acted as an effective fire carrier from the place where the fire was started to where it entered the cane-field;

"And if you find that there was nothing else that could have acted as a fire carrier from the place where the fire was started to the cane-

field, and that but for said accumulation of dry materials the said fire could not have reached the cane-field of the plaintiff;

"And if you also find from the evidence that all the land included in the path of the fire from its starting point to the cane-field was also part of the land of Aamakao held under lease by the plaintiff, in its possession and under the control of its manager and servants;

"And if you also find that the manager of the plantation of the plaintiff, for a long period prior to the date of October 18th, 1912, had knowledge of all conditions of wind and weather existing in the District of North Kohala, and more especially at Aamakao, and had knowledge of the conditions as to the accumulation of dry materials in that part of the plaintiff's land, lying between the Government road and the east boundary of its cane-field and more especially the part thereof in the path over which the fire traveled from the place where it was started to the cane-field;

"And if you also find that with such knowledge, the manager or servants of the plaintiff neglected to do any acts to destroy the effectiveness of said accumulation of dry materials as a fire carrier, either by burning the same by a back-fire, or clearing away a space sufficient in width to stop any fire originating from any source on the windward side of the said cane-field;

"And if you believe that to destroy in some way the effectiveness of the dry materials as a fire carrier, to prevent any fire originating from any source, was such an act as any reasonably prudent person would have done, and that if such had been done, that then the fire could not have reached the cane-field, then I further instruct you that the neglect of the manager or servants of the plaintiff to destroy in some way the effectiveness of said dry materials as a fire carrier was contributory negligence and is, therefore, a bar to recovery of damages by the plaintiff, and that your verdict must be for the defendant.

"Instruction No. 6.

"You are instructed that contributory negligence is such negligence on the part of the plaintiff as helped to produce the injuries complained of, and if you find from a preponderance of all the evidence in this case that the plaintiff was guilty of any negligence that helped to bring about or produce the injury complained of, then in that case, the plaintiff cannot recover in this action.

"Sec. 1351, Sackett on Instructions.

"Instruction No. 7.

"You are instructed that the law places upon all persons the duty of exercising reasonable care to avoid injury, and even though you should believe from the evidence that the employees and servants of the defendant were negligent and

that the property of the plaintiff was injured thereby, still if the evidence also shows that the injury would have been avoided by the exercise of ordinary care by the plaintiff or its manager or servants, and that the said plaintiff or its manager or servants did not exercise such care, then you should find for the defendant.

"Sec. 1352, Sackett on Instructions."

(Transcript of Record, pp. 295 to 297.)

The three instructions requested by the defendant, the County of Hawaii, and refused by the Trial Court all have the same import. The one designated No. 5 merely specifies in detail the facts by which the jury was to judge whether a reasonably prudent manager of a sugar plantation would have permitted such conditions to continue under the prevailing conditions of wind and weather at that time.

The following is the ruling of the appellate court, the Supreme Court of the Territory of Hawaii, bearing on the refusal of the Trial Court to give said instructions:

"The defendant requested the Court to instruct the jury upon the question of contributory negligence to the effect that although the jury should find that the injury to the plaintiff was caused by certain specified acts of negligence of the employees of the defendant, yet, if the jury should find from the evidence that the plaintiff was negligent in permitting the space intervening between the road where the fire was started and the cane-fields of the plaintiff to remain covered with dead grass and leaves

from lauhala trees there growing, that this was contributory negligence on the part of the plaintiff and that the verdict should be for the defendant. This request was properly denied. It involved the proposition that it was the duty of the plaintiff to keep a space outside of its cultivated fields clear of inflammable material, and failing to do so could not recover for damages sustained by the negligence of defendant's road employees in starting a fire on the road contiguous to such inflammable material. It is apparent that the fire was not started by accident, but intentionally and for the convenience of defendant's servants. The authorities cited by the defendant in support of the aforesaid proposition are cases where fires have been started from sparks emitted by steam engines running upon railways. We do not consider those authorities applicable to the case at bar for the reason that in such cases the adjoining owner has knowledge that fires are liable to occur from accident by the emission of sparks from steam engines daily traveling along the railway and he should take the precaution to keep inflammable material off of his own premises within the known danger zone. Here no such known danger existed and the plaintiff had no reason to apprehend danger to its property from fires likely to be started by accident, and the injury that it sustained was not caused by fire started by accident. The law does not require anyone to take precautions against un-

known intentional wrongful acts of another, nor make it his duty to presume that another will intentionally do a wrongful act that will result in injury to his property. If the failure of the plaintiff to keep the intervening space between the highway and its fields clear of leaves and dead grass is contributory negligence, it is such by reason of some rule of law imposing this duty upon it, in which event such failure might be held, as matter of law, to have contributed to the injury sustained. The requested instruction was based upon the presumed existence of such rule of law, but we know of no authority to sustain it under circumstances like those shown to have existed in the present case. We are therefore unable to hold that the Court erred in refusing to give the requested instruction, and hold that the same was properly refused."

(Transcript of Record, pp. 305, 306.)

The aforesaid decision apparently misconceives the basis of the ground for the requested instruction. The requested instruction involved no proposition that if the failure of plaintiff corporation to keep the intervening space between the highway and its fields clear of leaves and dead grass is contributory negligence, "it is such by reason of some rule of law imposing this duty upon it." The Court well said, "We know of no authority to sustain it," for there is no such rule of law. It was never contended by the defendant County, neither in the trial nor in the appellate court, that there was such a rule of law.

Under such conditions and circumstances, the manager of the plaintiff corporation permitted a valuable field of cane to lie for weeks, exposed to every contingency of fire that might originate anywhere windward of the cane-field and with no barrier to serve as a fire break other than a wire fence.

It is not contended that the foregoing facts and circumstances are indisputable proof of negligence on the part of the manager of the plaintiff corporation, but it is contended that, whether a careful, prudent manager would have thus exposed valuable property to the hazard of fire under such conditions and circumstances was a question for the jury. The failure of the Court to give the jury any instruction on the question of contributory negligence was in effect instructing the jury that such a condition under the circumstances was not negligence. Or, in other words, that plaintiff had a right to keep its waste lands in any condition it saw fit, regardless of whether defendant thereby incurred liability by the use of fire in conducting its road improvements.

The attitude of plaintiff toward defendant may be stated in another way.

The manager of the plaintiff corporation in effect said to defendant, "You may not employ the use of fire as your agent in conducting your road improvements, because I do not care to take the trouble to put my waste land in a safe condition to prevent your fire escaping to my cane-field."

The said opinion further continues:

> "No known danger existed and the plaintiff had no reason to apprehend danger to its prop-

> erty from fires likely to be started by accident, and the injury it sustained was not caused by fire started by accident. The law does not require anyone to take precautions against unknown intentional wrongful acts of another nor make it his duty to presume that another will intentionally do a wrongful act that will result in injury to his property."

The term, "intentionally do a wrongful act," as used by the Court, is too strong. There is no evidence to support a culpable *intention* to do a wrongful act. The strongest expression that could apply would be "negligently started a fire." Assuming, but not admitting, that the County was liable for the negligent act of its employee, and admitting the sound legal proposition that the law does not make it the duty of anyone to presume that another will negligently do an act that will result in injury to his property, yet the correlative of the proposition is just as true that the employee of the County had the same right to presume that the other had not negligently left its property exposed to danger. Both the trial and the appellate courts evaded the fact that it required the concurrent negligence of both parties to produce the injury. The proposition is as old as the story of the servant of Mann who drove his master's team along the road at a "smartish pace" and ran over the donkey belonging to Davies, who had turned it out on the road, hobbled so it could not get out of the way. It perhaps will be contended by counsel for the plaintiff corporation, as it was in the case of Davies v. Mann, that the servant

of the County should have discovered the exposed condition of plaintiff's cane-field. But that again raises a question of fact for the jury, not a question of law for the Court. (Bradley v. Great Northern Ry. Co., 2 Thomp. Neg., p. 1108.)

The contention of the plaintiff corporation seems to be, and we confess it has been sustained by both the Trial and the Supreme Courts, that a man can do as he pleases with his own property upon his own land; that he may imprudently expose it to danger regardless of the negligence of his neighbor; that his neighbor cannot dictate how he shall use his property. The contention of counsel for the County does not deny a man's abstract right to so deal with his own property on his own land; to neglect all precaution to shield it from fire or other dangerous elements. But counsel further contends that if one so imprudently exercises the abstract right which he has, so that his imprudent act thereby concurs with the negligence of his neighbor in the destruction of his own property, then his own imprudence, which is but another name for negligence, contributes to his own loss, and he cannot recover.

The case of Keese v. C. N. & W. R. Co., 30 Iowa, 78, is perhaps as nearly in point with our contention as can be found. The action was for damages for the burning of plaintiff's haystacks, situated half a mile from the railroad on the open prairie, the intervening space being covered with inflammable material, and plaintiff having taken no precaution to destroy its effectiveness as a fire carrier by plowing around his stacks. Under instructions given by the

lower court, the verdict of the jury was for plaintiff, and defendant appealed. The instruction was as follows:

> "When a person, in the ordinary exercise of his own rights, allows or places his property in an exposed position, and it is injured or destroyed by reason of the negligence of another, he may still recover for the consequences of such negligence; when a party leaves his property in an exposed position, he takes the risk of accidents, but not the risk of another's negligence. If the plaintiff had his property in an exposed position, or put it up in an imprudent manner, if he placed it on his own premises, or where he had a lawful right to place it, he took the risk of its being burned by the accidental escape of fire from the defendant's engines running near it; but he did not take the risk of negligence on the part of defendants, and, if his property has been destroyed by their negligence, he is entitled to recover its value."

Because of error in the giving of the foregoing instruction, the Supreme Court, on defendant's appeal, reversed the judgment and ordered a new trial. As grounds for reversal, the Supreme Court said:

> "The doctrine was announced in and was well illustrated by the case of Cook v. The Champlain Transportation Co., 1 Denio, 90. But that it has its limitations is very apparent from the proposition itself, as well as from the equally well-settled doctrine, that where a plaintiff has,

by his negligence, contributed to a loss, he cannot recover therefor. The owner of land along a railway has the right to stack his wheat or hay, or to build and operate a powder-house on the line or margin of the right of way of a railroad. But the instinctive sense of prudence innate in every reasonable person would say that such a use of one's own property was *per se* negligence—carelessness. It being negligence to thus place his property in such an exposed position, he could not recover, although it should be destroyed by reason of the negligence of the railroad company, because his own negligence in thus placing his property contributed to the injury and loss. Or, suppose the owner of an elevator on the line of a railroad should make a thatched roof, instead of a shingle or slate roof, which he clearly has an abstract right to do, and, by reason of such thatched roof and the negligence of the railroad company, his elevator should be consumed by fire,—could he recover? Clearly not; and why? Not because he had no right to build his elevator and thatch the roof, but because to do so is negligence, carelessness, which contributed to his loss.

"Now, although the plaintiff had the right to stack his hay on the open prairie, and thereby only took the risk of accidents and not of defendant's negligence, yet, if by plowing around his stacks, or otherwise protecting them, he could have prevented the loss, and to omit thus protecting them was negligence, he could not,

under the well-settled rule above stated, be entitled to recover. But the instruction says, 'if the plaintiff had his property in an exposed position, or put it up in an imprudent manner, if he placed it where he had a lawful right to place it, etc.,' he may recover if it was destroyed by the negligence of defendants. Could he recover if it was negligence to thus place his property and leave it without any protection, and the absence of such protection contributed to its loss? Surely not; for where both parties have been guilty of negligence contributing to the loss neither can recover. The instruction, then, is fatally defective, in that it does not submit to the jury the question whether plaintiff by his negligence contributed to his loss, and, if so, then he could not recover. And it is not only defective in this, but is affirmatively erroneous, in that it says to the jury that the plaintiff may recover, although he placed his property in an exposed position and put it up in an *imprudent manner*. What is an imprudent act? It is no more or less than a heedless, rash, careless, negligent act. So that in fact the jury was told that plaintiff could recover for his hay, although he was guilty of negligence in the manner of putting it up."

The said Supreme Court of the Territory of Hawaii makes a distinction in the danger that arises from sparks emitted from a railway locomotive, and the danger from the fire under the conditions we are

now considering, and held, as a question of law, that there is a known danger zone along the line of a railway and that there was no danger existing on the slopes of Aamakao gulch, or along the public road across said gulch. But that is a question of fact for the jury and not a question of law for the Court. Modern railway locomotives are equipped so that the danger from fire is reduced to the minimum. Along the road across Aamakao gulch probably hundreds of persons pass daily, from any one of whom there was more danger from fire from the use of cigarettes than from a modern equipped locomotive. The twelve jurors who sat in the trial court were familiar with the dangers that arise from such causes and were familiar with the precautions prudent plantation managers take to guard against such dangers. The law makes the jury the sole judge in such cases. This was the question the defendant requested to have submitted to the jury, but which was refused by the trial court, and is one of the questions that has brought the case to this court. Perhaps every juror who sat in the trial court had lived and labored on sugar plantations during such a drought and knew the habits of plantation laborers, as to the use of cigarettes.

The application of the rule that governs in such instances is clearly stated in the case of Grand Trunk Ry. Co. v. Ives, 144 U. S. 408. Although a railroad was involved the question of negligence was not a case of fire started by sparks from a locomotive. One of the instructions given to the jury in the trial court was as follows:

"You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the Judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject."

The verdict was in plaintiff's favor and the defendant railway company sued out a writ of error from the U. S. Supreme Court, one of the assignments of error being the giving of aforesaid instruction. The U. S. Supreme Court in commenting thereon said:

"But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a Court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy

of the law has relegated the determination of such questions to the jury, under proper instructions from the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

Further in the same opinion, the Court said:

"It is earnestly insisted that, although the defendant may have been guilty of negligence in the management of its train which caused the accident, yet the evidence in the case given by the plaintiff's own witnesses shows that the deceased himself was so negligent in the premises that but for such contributory negligence on his part the accident would not have happened; and it is, therefore, contended that the court below should, as matter of law, have so determined, and it not having done so, this Court should so declare, and reverse its judgment. To this argument several answers might be given, but the main reason why it is unsound is this: As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the

Court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. * * * There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other."

CONCLUSION.

For the reasons hereinbefore set forth, it is respectfully submitted that the judgment heretofore rendered on behalf of the defendant in error should be reversed.

Respectfully submitted,

(Sgd.) WADE WARREN THAYER,
Attorney for Plaintiff in Error.